UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:06-cv-00400-BR

SUELLEN E. BEAULIEU, et al, **Plaintiffs,** **v.** **EQ INDUSTRIAL SERVICES, INC., et al,** **Defendants.**	**PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR CERTIFICATION OF SETTLEMENT CLASSES AND RELATED MATTERS** **This Document Relates To: ALL CASES**

I. INTRODUCTION

Plaintiffs, Suellen E. Beaulieu, et al. individually and on behalf of all others similarly situated ("Plaintiffs"), and defendants EQ Holding Company, and EQ Industrial Services, Inc. (hereinafter collectively referred to as "EQIS"), Allworth LLC f/k/a Allworth, Inc. (hereinafter referred to as "Allworth"), and ST Mobile Aerospace Engineering, Inc. (hereinafter referred to as "MAE") (collectively referred to as "Defendants") have jointly requested, pursuant to Rule 23(a), 23(b)(3) , 23(c)(5), and 23(e) of the Federal Rules of Civil Procedure, that the Court: (1) certify, for the purposes of settlement, three subclasses; and (2) preliminarily approve the settlement of the proposed classes as set forth in the Preliminary Settlement Agreement ("PSA") dated March 23, 2009, attached as Exhibit 1 to the parties' Joint Motion filed concurrently herewith, together with all of its Exhibits attached thereto. Further, the Plaintiffs and Defendants jointly request approval of the Class Notice and Proof of Claim Forms attached as exhibits to the PSA, and request that the Court schedule a Final Fairness Hearing to consider final approval of the PSA and certification of the Settlement Classes. Finally, as part of the preliminary approval process, Plaintiffs and Defendants request that the court: (1) appoint Daniel T. Barker, Esq., as Guardian ad Litem (*See Barker Affidavit attached as Exhibit 1 and Barker CV attached as Exhibit 2*); (2) appoint James L. Griggs of Litigation Settlement Services as class Settlement Administrator (*See Affidavit of the Settlement Administrator attached as Exhibit 3*); and (3) appoint Henry T. Dart, Donald J. Dunn, M. David Karnas, J. Michael Malone, Roger W. Orlando, Jesse S. Shapiro, and Robert E. Zaytoun as Class Counsel for the Settlement Class. *(See Affidavits of Class Counsel attached hereto as Exhibits 4-9*). In support of the Parties' Joint Motion, Plaintiffs submit this memorandum.

II. BACKGROUND OF THE CASE

This matter arises out of an October 5, 2006 fire at a facility owned and operated by EQIS in Apex, North Carolina. During the fire, chemical oxygen generators, shipped to EQIS by MAE and Allworth, allegedly contributed to the fire (these events are hereinafter referred to as "the Incident"). As a result of the Incident, emergency response authorities ordered the evacuation of area residents (in the Recommended Evacuation Zone) beginning in the evening of October 5, 2006 and ending on October 7, 2006. Further, some residents outside the Recommended Evacuation Zone also evacuated (in the Secondary Evacuation Zone). The evacuation also resulted in the closure of certain businesses within and geographically contiguous to the Recommended Evacuation Zone. Plaintiffs alleged that the above-described actions or inactions of Defendants caused Plaintiffs and the Class substantial damages, including the necessity to evacuate homes and businesses (in both the Recommended and Secondary Evacuation Zones), the loss of use of homes and businesses, lost earnings and wages, lost profits from businesses, inconvenience, and other related damages. Plaintiffs and Class Counsel have estimated that the evacuation order resulted in the evacuation of approximately 3,900 households, comprising approximately 12,000 residents in the Recommend Evacuation Zone, and 300 households comprised of approximately 900 residents in the Secondary Evacuation Zone. It is also estimated that approximately 542 businesses were forced to close.

As a result of the Incident, seven (7) lawsuits (including four (4) putative class actions) — in which claims were made for the recovery of compensatory and punitive damages as a consequence of the Incident — were initiated against EQIS, Allworth, and/or MAE by the Plaintiffs and others. All but one of these actions was filed in or removed to the United States District Court for the Eastern District of North Carolina, Western Division, where five (5) cases have been consolidated for pretrial purposes in that court. On July 2, 2007, Plaintiffs filed a Master Supplemental and Amended Class Action Complaint relating to all consolidated cases. Through extensive discovery and motion practice, Class Counsel have been able to narrow the litigation to claims for evacuation-related damages and business losses as a result of the Incident. Consequently, the Fourth Supplemental and Amended Class Action Complaint, filed on March 23, 2009, contains class action allegations limited to negligence claims for the damages set forth above.

III. ARGUMENT IN SUPPORT OF CLASS CERTIFICATION

An indispensable component of the proposed settlement entails certification of a class and sub-classes for settlement purposes. Without certification, there would be no class with which to settle, and Defendants would not benefit from a class-wide dismissal of claims. Professor Newberg states:

> As a practical matter, the decision of the court to permit notice of the proposed settlement to issue inherently carries with it a preliminary determination that Rule

> 23 criteria will be satisfied if the settlement is approved. In fact, one part actually cannot take place without the other. A class settlement cannot technically be approved unless, by definition, a class is upheld.
>
> 4 Alba Conte & Herbert B. Newberg *Newberg on Class Actions* § 11.27, p. 54 (4th ed. 2002).

Although the parties have agreed to settle on a class-wide basis, they still must establish that (1) the proposed sub-classes are certifiable, and (2) that the settlement is fair. *Amchem v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231 (1997).

In this case, the parties propose a settlement class defined as follows:

> All natural persons, whether minor or adult, and Businesses including those falling within one or more of the following sub-classes, including any person or entity claiming by, through or under a Class Member (as defined in the PSA), who seek compensation for damages from the Incident, but excluding those persons or Businesses who would otherwise be Class Members, but who or which are: (i) Defendants, or any of their employees, agents, insurers, contractors, and subcontractors, including employees of Defendants' agents, contractors or subcontractors, (ii) the Court and Court personnel and their immediate families, (iii) the attorneys who have made appearances for any of the Parties; and (iv) Opt- Outs.

Pursuant to Fed. R. Civ. Proc. 23(c)(4)(B), the class may be subdivided into sub-classes, which include:

> Subclass 1– Recommended Evacuation Subclass:
>
> All natural persons, including minors and adults, who, on October 5, 2006 resided within the geographic boundaries of the area of the Recommended Evacuation Zone (as defined in the PSA) and who evacuated in response to the Incident.
>
> Subclass 2 – Secondary Evacuation Subclass:
>
> All natural persons, including minors and adults, who, on October 5, 2006 resided outside the geographic boundaries of the Recommended Evacuation Zone, but within the geographical boundaries of the Secondary Evacuation Zone (as defined in the PSA), and who evacuated in response to the Incident.
>
> Subclass 3 – Business Loss Subclass

> All Businesses that were physically located within or geographically contiguous to the Recommended Evacuation Zone (as defined in the PSA) on October 5, 2006 that were forced to cease business operations in response to the Incident and sustained provable economic losses as a result of the Incident.

As explained below, the proposed settlement class, and accompanying subclasses, are certifiable and will result in a settlement that is fair.

A. The Proposed Class and Subclasses Are Certifiable

In order to certify a settlement class, the Court must examine whether the settlement class complies with Rule 23 of the Federal Rules of Civil Procedure. See *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In *Amchem,* the Supreme Court approved the concept of certification of classes for settlement purposes only, and held that courts must ensure that the class complies with the requirements of Rule 23(a) and at least one of the subsections of Rule 23(b). The Supreme Court excluded from the analysis whether the case, if tried, would present trial management problems because the settlement precludes any trial. In addition, the Supreme Court pointed out that the fact of settlement itself is relevant to the decision to certify a class. *Amchem,* 521 U.S. at 619. Courts in the Fourth Circuit post *Amchem* have certified classes at the settlement stage, noting that such a certification does not present the same problems that certification of a litigation class proposing the same class definition would present. See *In re Serzone Products Liability Litigation,* 231 F.R.D. 221, 239 (S.D.W.Va. 2005); see also *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 440 (4th Cir. 2003). This is particularly true when courts are faced with certification of a settlement class in the context of a the single event mass tort class action.

1. The Parties' *Proposed Settlement Classes Meet the Requirements of Federal Rule of Civil Procedure 23(a)*.

Rule 23(a) provides as follows:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The four prerequisites of Rule 23(a) are easily summarized to require the following: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. As will be demonstrated below, each of these requirements are satisfied in this case.

a. ***Numerosity***

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." When considering the number of class members necessary to satisfy the numerosity requirement, courts in this Circuit have determined that as few as 18 class members were sufficient to satisfy this criterion. *Cypress v. Newport News General & Nonsectarian Hospital Ass'n,* 375 F.2d 648, 653 (4th Cir. 1967); see also: *Holsey v. Armour & Co.,* 743 F.2d 199, 217 (4th Cir. 1984) (between 46 and 60 members sufficient), *cert denied,* 470 U.S. 1028 (1985); *Brady v. Thurston Motor Lines,* 726 F.2d 136, 145 (4th Cir.) (74 members sufficient), *cert denied,* 469 U.S. 827 (1984); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983) (229 members sufficient), *cert denied,* 466 U.S. 951 (1984); *Harris v. McCrackin,* 2006 WL 1897038 (D.S.C. 2006).

The proposed Subclasses 1 and 2 contain approximately 13,000 residents from 4,200 households. The proposed Subclass 3, the Business Loss Subclass, includes over 500 businesses. Indeed, it would be wholly impracticable, if not impossible, to join individual members of a class of this size.

b. *Commonality*

Rule 23(a)(2) requires the existence of one or more "questions of law or fact common to the class." In the present case, common questions of law and fact exist with respect to: (1) the alleged negligence of Defendants; (2) whether Defendants' alleged negligence was a proximate cause of the evacuation and business losses; (3) Defendants' liability for punitive damages; and (4) quantum of punitive damages.

The Fourth Circuit has held that "[i]n a class action brought under Rule 23(b)(3), the 'commonality' requirement [of Rule 23(a)(2)] is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." *Lienhart v. Dryvit Syst., Inc.* 255 F.3d 138, 147 n. 4 (4th Cir. 2001) (citing *Amchem,* 521 U.S. at 609, 117 S.Ct. 2231). Because this is a class action brought under Rule 23(b)(3), the commonality requirement will be discussed in greater detail in the predominance section of this memorandum.

c. *Typicality*

Rule 23(a)(3) requires that the claims and defenses of the representative parties be typical of the claims and defenses of the class as a whole. In determining whether the claims of the class representatives are typical of the class, the Court looks to the nature of the claims asserted (i.e. the legal theory) rather than any specific factual differences amongst class members. See *Woodard v. Online Info. Servs.*, 191 F.R.D. 502, 505 (E.D.N.C. 2000) (citing *Holsey v. Armour & Co.*, 743 F.2d 199, 216-217 (4^{th} Cir. 1984).

Here, the named class representatives, as well as the class at large, seek damages from evacuations that resulted from a single, discrete event (a fire at EQIS's facility in Apex) and based on a single legal theory (negligence of the Defendants). Proof of common facts and legal theories for Defendants' alleged liability to the class representatives is identical for that of the class, and will typify the class as a whole. The damages suffered by the members of each sub-class are uniform and essentially the same. The fact that some plaintiffs may have been damaged to a slightly greater or lesser extent will not defeat satisfaction of Rule 23(a)(3). See *Roger v. Electronic Data Systems Corporation*, 160 F.R.D. 532 (E.D.N.C., 1995); *Haywood v. Barnes*, 109 F.R.D. 568, 578 (E.D.N.C., 1986); *In re Polyester Staple Antitrust Litigation*, 2007 WL 2111380 (W.D.N.C., July 19, 2007) at p. 10.

The designated class representatives for the Recommended Evacuation Subclass each assert only evacuation-related damages and these damages typify persons within the Recommended Evacuation Zone. Similarly, Josephine Cross, the designated representative for the Secondary Evacuation Subclass, seeks only evacuation-related damages which are likewise typical of the class she represents. Xios Restaurant, LLC seeks business-related losses only and, therefore, asserts claims typical of other businesses within the proposed Business Loss Subclass.

d. *Adequacy*

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement involves a two-part test: (1) whether plaintiffs have interests antagonistic to the interests of the other class members; and (2) whether the proposed class counsel has the necessary qualifications and experience to lead the litigation. See *In re Serzone Products Liability Litigation,* 231 F.R.D. 221, 238 (S.D.W.Va. 2005).

In *Gunnells v. Healthplan Services, Inc.,* 348 F.3d 417, 430-431 (4th Cir. 2003), the Fourth Circuit said: "[f]or a conflict of interest to prevent plaintiffs from meeting the requirements of Rule 23(a), the conflict 'must be fundamental. It must go to the heart of the litigation." Mere speculative conflicts are not sufficient to defeat the adequacy requirement. *Chisholm v. U.S. Postal Service*, 665 F.2d 482 (4th Cir. 1981)

In this case, no such fundamental conflict exists. The named plaintiffs share the same common objectives and the same factual and legal positions as the class. They have the same interest as the class in establishing the defendants' liability. The substitution of Josephine Cross for Nancy Hackney as a representative of the Secondary Evacuation Subclass solves any concerns the Court may have had as to the typicality of Mrs. Hackney's claim as it related to her potential claims arising from her husband's personal injuries. Ms. Cross has a purely evacuation claim in the Secondary Evacuation Zone.

The second prong of the adequacy test goes to the vigor with which the class representatives have prosecuted the lawsuit. Here, the Court's focus is "primarily on class counsel, not on the plaintiff, to determine if there will be vigorous prosecution of the class action." *Newberg*, *supra*, § 3:24, citing *Kirkpatrick v. J.C. Bradford & Co.* 827 F.2d 718, 726 (11th Cir. 1987). The members of the court-appointed interim Plaintiffs Management Committee have all submitted affidavits in support of the settlement, attesting to their qualifications. It should be clear from these affidavits and the performance of counsel that they have the requisite skill and experience in class actions and complex mass tort cases to assure vigorous prosecution of this case and implementation of the settlement plan. Therefore, the Parties suggest that the adequacy factors under Rule 23(a)(4) have been met and hereby move the Court to appoint the following attorneys as Class Counsel: Henry T. Dart, Donald J. Dunn, M. David Karnas, J. Michael Malone, Roger W. Orlando, Jesse S. Shapiro, and Robert E. Zaytoun. These attorneys have been intimately involved with this litigation from its inception, and they have vigorously advocated for the class through adversarial litigation and hard fought settlement negotiations.

2. *Plaintiffs' Proposed Settlement Class and Subclasses Meet the Requirements of Federal Rule of Civil Procedure 23(b)(3)*

Rule 23(b)(3) provides as follows:

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> …
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

In short, Rule 23(b)(3) asks whether: (1) issues of law and fact common to members of the class predominate over questions only affecting individual members (Predominance); and (2) whether a class action is the superior method of resolving the dispute (Superiority).

a. *Issues of Law and Fact Predominate*

To satisfy the predominance requirement in the context of a class settlement, the parties must do more than merely demonstrate a "common interest in a fair compromise"; instead, they must provide evidence that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 623 (1997).

In the context of mass tort litigation, such as the instant case, the Fourth Circuit in *Gunnells v. Healthplan Services, Inc., supra,* at p. 424. said:

> [A]s the Supreme Court has noted, the predominance and superiority requirements in Rule 23(b)(3) do not foreclose the possibility of mass tort class actions, but merely ensure that class certification in such cases 'achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' *Amchem*, 521 U.S. at 615, 117 S.Ct. 2231

> (quoting Adv. Comm. Notes, 28 U.S.C.App. at 697). For these very reasons, we have expressly 'embraced the view that the mass tort action for damages may be appropriate for class action, either partially or in whole.' *Central Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir.1992) (citation, internal quotation marks, ellipses, and alterations omitted).

One of the primary purposes of certifying a class action pursuant to Rule 23(b)(3) is to provide "a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protect(s) the defendant(s) from inconsistent adjudications." 5 *Moore's Federal Practice* § 23.02, (1999). The Fourth Circuit discussed this very issue in Gunnells:

> This protection from inconsistent adjudications derives from the fact that the class action is binding on all class members. *See* Fed.R.Civ.P. 23(c)(2)(B). By contrast, proceeding with individual claims makes the defendant vulnerable to the asymmetry of collateral estoppel. If TPCM lost on a claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent TPCM from litigating the issue. *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (concluding that the use of offensive collateral estoppel should not be precluded in federal courts). A victory by TPCM in an action by an individual plaintiff, however, would have no binding effect on future plaintiffs because the plaintiffs would not have been party to the original suit. *See* *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) ("[T]he concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue.") (citing *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). Class certification thus promotes consistency of results, giving defendants the benefit of finality and repose.[1]

Here, certification of a settlement class will give Defendants the ultimate protection from possible inconsistent adjudications - dismissal with prejudice with *res judicata* effect as to the entire class.

Analyzing the issue of predominance in a similar case, Judge Haden in *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D.156, 164-165 (S.D.W.Va. 1996) held:

> All of these issues (liability and general causation) are substantial and overriding on the resolution of the litigation as a whole. . . . Resolution of the common

[1] Gunnells v. Healthplan Services, Inc., *supra*, at p. 427.

> issues is what, practically speaking, will send a predictive message to both sides about the ultimate course of the litigation. For instance, if the jury in a common issues trial found Defendant (1) acted recklessly; (2) engaged in outrageous conduct; and (3) behaved in a fashion justifying punitive damages, one can imagine readily the impact such findings would have on the amicable resolution of the more fluid damages issues. On the other hand, a jury finding largely exonerating Defendant on the liability issues would sound the death knell for Plaintiffs' case. Either way, findings on the common issues may advance the litigation greatly. Accordingly, the Court finds Plaintiffs have met their burden of showing common issues predominate.

Similar to *Black*, virtually all of the legal and factual issues in this case are common to the entire class including the liability of the Defendants under negligence theory and the resultant common damages for the class members.

a. ***Superiority of the Settlement Class***

Rule 23(b)(3) lists the factors to consider in determining superiority:

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

As stated by the Supreme Court in *Amchem, supra*, Rule 23(b)(3)(D) considerations do not factor into the analysis in the context of certification of a settlement class "for the proposal is that there be no trial." Therefore, we will restrict our analysis to the first three Rule 23(b)(3) considerations.

i. Class Members' interest in individual litigation

Professor Newberg has opined that factors supporting individual litigation include "a high degree of emotional involvement, extremely large damage claims, and a desire to tailor trial tactics to individual needs."[2] Based on information obtained during discovery to date, none of these factors exist here.

The actual damages suffered by the Plaintiffs and the class are rather small in relation to the magnitude and expense of proving the common liability issues. Indeed, the class representatives have proposed class member settlements that are far exceeded by the litigation costs and expenses. Additionally, the potentially individualized personal injury claims are specifically excluded from the class settlement. Therefore, class members desiring individual litigation of the personal injury claims will not affect the Rule 23(b)(3)(A) analysis.

ii. Existence of other litigation

Upon information and belief and followed diligent inquiry, there is only one other pending lawsuit arising from the Incident other than the pending consolidated putative class actions. The case before this Court is a consolidated action arising from multiple class action lawsuits filed in this Court and in Wake County Superior Court for the State of North Carolina. The state court cases were removed to this Court and all of the cases were consolidated. While the existence of other lawsuits may suggest an interest in individual litigation, conversely, the lack thereof supports certification. All of the litigation, save one case brought by a single business, is presently before this Court in a consolidated putative class action.

iii. Desirability of concentrating litigation in one forum

The consideration found at Rule 23(b)(3)(C) is only relevant when litigation is commenced in other courts. That is not the case here, and all actions have already been consolidated in this Court.

It is clear from the foregoing discussion that all of the criteria of Rules 23(a) and (b)(3)

[2] Newberg, *supra*, § 4:29.

have been met, and that the proposed settlement class should be certified. Settling this action as a class is far superior to the risk of litigating, even on a class-wide basis. A class action ensures greater efficiency and consistency of results. Most importantly, class treatment in this context is also beneficial because it grants plaintiffs a definite recovery and dismisses Defendants from this Litigation with prejudice. As stated in *In re Serzone Products Liability Litigation,* 231 F.R.D. 221, 240-241 (S.D.W.Va. 2005)

> Absent the class procedures, many Class Members may be effectively foreclosed from pursuing their claims. Class actions are often the only means for assuring that defendants who have harmed consumers will not benefit from their unlawful conduct simply because of the magnitude of the misconduct and aggregated harm compared to the small magnitude of individual harm. *Gunnells v. Healthplan Serv., Inc.,* 348 F.3d 417, 426 (4th Cir. 2003). The individual harm is often too minimal to bear the high costs of individual litigation. *Id.* Thus, without the class device, thousands of plaintiffs could be denied their day in court. *Id.* The Supreme Court declared in *Deposit Guaranty Nat'l Bank v. Roper,* 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device."

IV. ARGUMENT IN FAVOR OF APPROVAL OF THE SETTLEMENT

A. Introduction

After over two years of hard-fought litigation, the Plaintiffs and Defendants participated in a series of mediations and settlement negotiations. At the conclusion of these discussions, and after analyzing the relevant facts, applicable law, including the burdens, risks, uncertainties, and time and expense involved in on-going litigation, the Plaintiffs and Defendants have agreed to a proposed class settlement as set forth in the PSA. The Plaintiffs and Defendants believe that the settlement, as set forth in the PSA, provides a procedure for a fair, cost-effective and sure method of resolving the claims of the proposed Class. *See Affidavits of Class Counsel, attached hereto as Exhibits 4-9.* Class Counsel have concluded that the settlement set forth in the PSA is fair, reasonable, adequate, and in the best interests of the proposed Class. *Id.* Likewise, Defendants have concluded, without any admission of liability, fault, or wrongdoing, that resolving the claims settled under the terms of the PSA is desirable to reduce the time, risk and expense of defending multiple claims and multiple party litigation, and to resolve finally and completely the damages claimed by the members of the proposed Class.

As stated above, although the parties have agreed to settle on a class-wide basis, the Plaintiffs still must prove that the proposed classes are certifiable and the settlement is fair. *Amchem v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231 (1997). It has been demonstrated above that the class should be certified for settlement purposes. Here, it will be shown that, pursuant to Rule 23(e), "the settlement is fair, reasonable, and adequate."

B. Summary of Proposed Class Settlement

While the terms of the proposed settlement are set forth in their entirety in the attached PSA, for the Court's convenience the important terms and features of the proposed settlement are summarized below.

Defendants agree to pay $7.85 million into a Common Settlement Fund which will be controlled by the Court and administered by the Court-appointed Settlement Administrator. The $7.85 million is set aside to pay the claims for members of three subclasses, as defined in the PSA. The three subclasses are: (1) evacuees in the Recommended Evacuation Zone; (2) evacuees in the Secondary Evacuation Zone; and (3) business loss claims for businesses within and geographically contiguous to the Recommended Evacuation Zone, with provable business losses resulting from the Incident. Subject to Court approval, after deduction of a maximum of

$425,000 for settlement administration costs/litigation expenses, 38% for attorneys' fees, and Class Representative Participation Awards totaling $100,000 to the Class Representatives, each eligible head of household in the evacuation subclasses will receive approximately $750.00 in net compensation, and each eligible business owner will receive up to $2,200 in net compensation. The PSA also allocates up to $80,000 for a public interest project (Cy Pres Fund) in the Town of Apex in the event settlement funds go unclaimed. The settlement also provides that all other unclaimed settlement proceeds will be paid back, or revert, to Defendants. Finally, eligible class members, who already received payments from EQIS as part of its claims program, will still be eligible for additional compensation here, equal to the difference between what they received from EQIS and the value of their claim under the class settlement.

The proposed settlement provides a compensation protocol for households and businesses located within each of the subclasses defined by distinct geographical boundaries. This protocol is attached to the PSA and is referred to as the Common Settlement Fund Distribution Protocol. The proposed settlement also provides for a Proof of Claims Processing Protocol with built-in process protections for the putative Class. The proposed Class will have ample time to fill out and submit Proof of Claim Forms (until July 31, 2009). Once a Class Member's submission has been evaluated and processed, the Settlement Administrator will serve a Claim Response Report on the claimant, outlining the relief, if any, to be afforded on the Class Member's claims. The Class Member may accept the proposed relief, or request reconsideration. The Class Member can also appeal a denial to the Court.

C. The Proposed Settlement Satisfies the Requirements for Preliminary Approval

The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement. *Manual for Complex Litigation* (Fourth) § 21.61. To determine whether a proposed settlement is fair, reasonable and adequate the court must examine whether the interests of the class are better served by the settlement than by further litigation. *Id.,* § 21.61.

In determining whether preliminary approval is warranted, two issues must be decided. The first issue is whether the proposed settlement is within the range of what might ultimately be found fair, reasonable and adequate, and thus warrants publication notice and scheduling of a hearing to consider final settlement approval. See *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 205 (5th Cir. 1981) (noting that district court granted preliminary approval and held that "these settlements are within the range of possible approval" (citation omitted); *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975); In *re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991); (conducting a preliminary review of whether a proposed settlement is within the range of reasonableness). The second issue is whether the proposed notice and notice plan will provide the best notice practicable, as required under Rule 23 and the due process clause of the Constitution. As explained below, the terms of the proposed Settlement are fair, reasonable and adequate (for preliminary approval purposes), and the notice plan exceeds the requirements of Rule 23 and due process.

1. Legal Standard

Rule 23(e) reads as follows:

> **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
> (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Judicial approval is necessary to insure that the rights of absent members are adequately protected. See *Jiffy Lube*, *supra.*, 927 F.2d at 158; *Clark v. Experian Info. Solutions, Inc.*, 219 F.R.D. 375 378 (D.S.C. 2003).

Courts apply a two-step approach to the settlement approval process. See *Gates v. Rohm and Haas Company,* 248 F.R.D. 434, 438-439 (E.D.Pa. 2008); *Armstrong v. B. of School Dirs*., 616 F.2d 305, 314 (7th Cir. 1980), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); In *re Mid- Atlantic Toyota antitrust Litig*., 564 F. Supp. 1379, 1384 (D. Md. 1983); *Horton v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 855 F. Supp. 825 827 (E.D.N.C. 1994). In the first step, preliminary approval, the court reviews the proposed settlement for obvious deficiencies, schedules a fairness hearing and provides the class with notice of the proposed settlement and hearing. In the second step, the court considers final approval of the proposed settlement at a formal fairness hearing during which arguments and evidence may be presented in support of and in opposition to the settlement. *See Horton*, 855 F. Supp at 827; Armstrong, 616 F.2d at 314; *Mid- Atlantic Toyota*, 564 F. Supp. At 1384; *Manual for Complex Litigation (Fourth)* §§21.632, 21.634 (2004) (hereinafter, "Manual"). At the later fairness hearing, the Court will be asked to consider, in an in-depth fashion, whether the proposed settlement is fair, reasonable, and adequate. See *Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984) (setting forth fairness and adequacy factors to be considered for approval of class settlement); *Jiffy Lube*, 927 F.2d at 158-59 (same); *Flinn*, 528 F.2d at 1173-74 (same).

On a motion for preliminary approval, however, the Court need only ascertain **whether there is "probable cause" to notify class members** of the proposed settlement and to proceed with a fairness hearing. *Mid-Atlantic Toyota*, 564 F. Supp. At 1384; *Armstrong*, 616 F.2d at 314 (emphasis added). When making a preliminary determination of the fairness of the settlement, the standard is not whether the settlement is the best of all possible deals:

> Of course it is possible ... that the settlement [terms] could have been better. But this possibility does not mean the settlement presented was not fair, reasonable or adequate. Settlement is the offspring of compromise; the question we address is not whether the final product could have been prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998); see also *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by negotiators").

Thus, in evaluating whether the settlement falls within the "range of possible approval" - and even later, when making a final determination of the settlement's fairness and adequacy – the Court's function should not be to second-guess the settlement's terms:

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by negotiators.

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459

U.S. 1217 (1983). Rather, the Court's focus should be on the terms of the settlement, not what might have been:

> It is, ultimately, in the settlement terms that the class representative's judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable, and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have been accomplished a better settlement is a matter equally compromised of conjecture and irrelevance. *In re Corrugated Container Antitrust Litig*., 643 F.2d at 212.

When a proposed settlement appears to fall within the range of "possible approval," it is appropriate to issue preliminary approval and direct notice to members of the settlement class. See *Horton*, 855 F. Supp. at 827-28; see also *Manual, supra*, §§21.632, 21.633.

2. There Is Probable Cause to Notify the Class Because the Proposed Settlement Is the Result of Arm's Length Negotiations

There is probable cause to notify the class of the proposed settlement because it is the result of arm's length negotiations. The Court's analysis should begin with a presumption that this settlement - the result of over a year of extensive negotiations - is fair:

> In general, a settlement arrived at after genuine arm's length bargaining may be presumed to be fair. "When sufficient discovery has been provided and the parties have bargained at arm's length, there is a presumption in favor of the settlement."
>
> *Dhaime v. John Hancock Mut. Life Ins*. Co., 177 F.R.D. 54, 68 (D. Mass. 1997) (citation omitted).

See also *In re Orthopedic Bone Screw Prods. Liab. Litig.,* 176 F.R.D. 158, 183 (E.D. Pa. 1997) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class") (citation omitted).

In analyzing whether there has been arm's length bargaining, courts consider (i) the posture of the case at the time of settlement, (ii) the extent of discovery that has been conducted,

(iii) the circumstances surrounding the negotiations, and (iv) the experience of counsel. See *Jiffy Lube*, 927 F.2d at 158-59; *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991).

With regard to the posture of the case, courts are concerned the status of the litigation at time of settlement, i.e., when the settlement occurred during the litigation timeline. If a class settlement occurs before litigation is commenced, courts are often suspicious of the parties' motives. However, when a class settlement is achieved during the course of hard-fought litigation over a two-year period, as occurred here, courts are less likely to disapprove of the settlement. Courts also consider the amount of discovery completed, the circumstances of negotiations and class counsel's experience. See *Jiffy Lube*, 927 F.2d at 158-59.

Here, because the court allowed merits discovery to proceed concurrently with class discovery, the parties were able to uncover sufficient evidence to make fully informed decisions and weigh the pros and cons of various settlement options. Indeed, the parties engaged in numerous discovery battles, some of which were presented to the Court for consideration. The parties also participated in more than twenty depositions, including three experts, and approximately fifty thousand pages of documents were exchanged. The settlement often was negotiated under contentious circumstances, and during heated debate. The skills of mediator Robert Beason were needed on three separate occasions during the course of a year to keep the parties on a settlement track. Further, the parties continued negotiations on their own accord during the last ten months at various locations over many days. Once an agreement in principle was reached, the onerous task of negotiating the painstaking details of the settlement agreement occurred over the course of thirty days. These sessions were often adversarial, and compromises were made only after hard fought debate. Finally, the experience of counsel who attended these sessions for all parties insured that neither side took advantage of the other.

The fairness factors from *Jiffy Lube, supra,* if applied here, favor preliminary approval of the proposed settlement. First, collusion is absent. A proposed class action settlement is considered presumptively fair where, as here, there is no evidence of collusion and the parties, through capable counsel, have engaged in arm's length negotiations. See *South Carolina Nat'l*, 139 F.R.D. at 339 ("In assessing fairness and adequacy of a proposed settlement "there is a strong initial presumption that the compromise is fair and reasonable.") (citation omitted); see also *Manual, supra*, §§21.61, 21.62.

Plaintiffs have litigated the action vigorously to benefit the proposed Class. Plaintiffs' efforts in advancing the proceedings were not affected by the on-going settlement negotiations, which were difficult, complex, and protracted.

Second, Class Counsel were fully and sufficiently informed to vigorously advocate on the putative Class' behalf. In addition to the extensive formal discovery summarized previously, Class Counsel engaged in extensive factual investigation and legal analysis in order to obtain sufficient information to weigh the benefits of the proposed Settlement against the risks of continued litigation. *Cf. Jiffy Lube*, 927 F.2d at 159 (noting that fairness factors satisfied notwithstanding early stage of litigation at which settlement reached). It is on the basis of their extensive investigation and analysis that Class Counsel, who have substantial experience in prosecuting and negotiating the settlement of mass accident class actions, recommend approval of the Preliminary Settlement Agreement as in the best interest of the putative Class. See *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) (noting that the court is "entitled to give consideration to the opinion of competent counsel that the settlement [is] fair, reasonable, and adequate"); see also *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) (noting that absent fraud, collusion or the like, courts should be hesitant about substituting their own judgment for that of counsel). The affidavits of class counsel are attached to the PSA.

3. The Proposed Settlement Falls within the Range of Possible Approval

The proposed settlement falls within the range of possible approval and therefore should be preliminarily approved. Courts consider the adequacy of the settlement to determine whether the compromise falls within the range of possible approval. See *In re Serzone Prods. Liab. Litig.*, 2004 WL 2849197, at *2-3 (preliminarily approving class settlement); see also *Mid-Atlantic Toyota,* 564 F. Supp at 1385. The adequacy factors are: (i) the likelihood of success at trial and potential recovery; (ii) the complexity, expense and duration of litigation; (iii) the terms of settlement; (iv) the procedures afforded to notify the class members of the proposed settlement, and to allow them to present their views; (v) the judgment of experienced counsel for the plaintiff class; (vi) the substance and amount of opposition to the settlement; and (vii) the stage of the proceedings at which the settlement was achieved. See *Strube v. Am. Equity Inv. Life Ins. Co.,* 226 F.R.D. 688, 697 (M.D. Fl. 2005); *Elkins v. Equitable Life Ins. Iowa*, 1998 WL 133741, at *25 (M.D. Fl., Jan. 27, 1998); *In re Corrugated Container Antitrust Litig.*,643 F.2d at 212; see also *Jiffy Lube*, 927 F.2d at 159; *Flynn*, 528 F.2d at 1173-74. While the Court will consider these factors and the adequacy of the proposed settlement in more detail at the final fairness hearing,[3] weighing these factors now demonstrates that the proposed settlement is adequate for preliminary approval purposes and that the proposed settlement falls within the

[3] It is at the full fairness hearing that the Court will vet, in-depth, the fairness, reasonableness and adequacy of the proposed settlement. See, *South Carolina Nat'l Bank*, 139 F.R.D. at 338-41. At the preliminary approval stage, the Court looks to the fairness and adequacy factors only to the extent necessary to determine that the proposed settlement falls within the range of possible approval. Indeed, even at the final approval stage, courts are "not to decide the merits of the case or to attempt to resolve unsettled factual or legal questions when reviewing the adequacy of a proposed settlement." *South Carolina Nat'l Bank*, 139 F.R.D. at 339.

range of possible approval.

The strength of Plaintiffs' case balanced against the relatively assured compensation under the proposed settlement weighs in favor of the adequacy of the compromise. Plaintiffs' ability to prevail on the merits of this litigation, like all contested matters, contains risks. The proposed settlement, however, confers relatively assured and substantial benefits ($7.85 million) for Class members' claims for damages as a result of the fire. While Class Counsel believe that they will prevail at trial, defense counsel are equally as confident. Hence, the benefit of settlement now to the putative class members exceeds the cost of continued and protracted litigation, and thus avoids the potential risks associated with a trial.

The complexity, length, and expense of further litigation weigh heavily in favor of the proposed settlement. There is no doubt that the time and expense of continuing the litigation would be substantial. The trial is set for October, 2009, and it could be 2011 or longer before any money would be paid to a class member through judgment at trial and subsequent appeals. Further, transactional costs of continuing the action in the courts could reduce whatever judgment Plaintiffs could recover through litigation. Avoiding the unnecessary and unwarranted expenditure of resources and time would benefit all parties and the Court. See In *re Prudential Sec. Inc. Ltd P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995). The proposed settlement provides an expeditious route to recovery for the Class that heavily outweighs the cost, uncertainty, and various other risks associated with continued litigation.

The terms of the settlement are fair, and the compensation afforded under the PSA correlates adequately with the claims of damages and losses asserted by Plaintiffs. Pursuant to the PSA, each head of household in either the Recommended or the Secondary Evacuation Zones may be eligible to receive approximately $750.00 (after deduction of all attorney fees, litigation expenses and settlement administration costs). This net amount of compensation for evacuation damages is significantly greater than the average amount that EQIS paid claimants pursuant to its program. The PSA also provides that any claim for business loss may be eligible for up to $2,200 in net compensation. It is Class Counsel's opinion that the amount of compensation provided under the proposed settlement is consistent with Class Counsel's best assessment of the damages and losses relating to the Plaintiffs' claims that are to be settled.

The parties have also established a "Cy Pres Fund" or public interest fund, as part of the settlement, to benefit the Town of Apex. The Cy Pres Fund is to be funded up to the amount of $80,000 from money left unclaimed by class members. The PSA sets up a $7.85 million common fund for the benefit of all class members; however, if certain class members elect not to exercise their right to recovery, half of the money left unclaimed will go to the Town of Apex up to the amount of $80,000, to be used, for example, to purchase additional protective equipment for their emergency responders. All other unclaimed funds will go back to Defendants. Finally, the PSA even provides compensation to those claimants who previously received money from EQIS as part of its claims program. The PSA allows them to recover the difference between what they previously received from EQIS and the amount of their class claim.

To date, the parties have received no opposition to this proposed settlement from any putative class member. In fact, each class representative plaintiff will be submitting an affidavit prior to the final fairness hearing in support of the settlement. Some of the Class Representatives were present during the mediation sessions and actively participated with Class Counsel in the settlement talks that occurred in North Carolina. The parties are presently unaware of any opposition to the proposed settlement.[4]

V. RELEASE OF CLAIMS

A. Claims not raised in the complaint may be released

The PSA purports to release any and all claims that class members may have arising out of the Incident, with the singular exception of personal injury claims which are reserved. In furtherance of the Parties' intent, Paragraph 3.45 of the PSA defines "Released Claims" as follows:

> "Released Claims" shall mean all claims for compensatory and/or punitive damages arising out of the Incident, other than personal injury claims, by or on behalf of the named Plaintiffs, the Class, all Class Members, their successors, assigns, legal guardians, heirs, or beneficiaries, any natural or legal person or entity entitled to assert any claim on behalf of any Class Member, and any person or entity who or which derives or obtains any right from or through any Class Member for the Released Claims, against any of the Released Entities under any legal or equitable theory, or body of law, whatsoever, including but not limited to, negligence, nuisance, trespass, strict liability, res ipsa loquitur, negligence per se, liability for ultra-hazardous activities or conduct, absolute liability, liability for any willful, wanton, reckless, or punitive conduct, liability for intentional or deliberate acts, liability that is derivative or vicarious arising out of the conduct or fault of others for which the Released Entities may be legally responsible, whether statutory, regulatory, or case law, whether federal, state, or local, arising out of, related to, or connected in any way with the Incident, but specifically excluding Excluded Claims (as defined above). [emphasis added]

---

4 The *Manual* provides several examples of settlement concepts that Courts may have concerns about, such as: (i) providing class members illusory non-monetary benefits, such as discount coupons, while awarding substantial attorney fees; (ii) voluntarily dismissing class allegations for strategic purposes; (iii) imposing strict eligibility conditions, or cumbersome claims procedures, to make it difficult to qualify for benefits, so that unclaimed portions revert to defendants; (iv) treating similarly situated class members differently; (v) releasing claims of parties who received no compensation in the settlement; (vi) setting attorney fees based on a very high value ascribed to non-monetary relief and calculating the fee based on the allocated funds, rather than the funds actually claimed by and distributed to class members; and (vii) assessing class members for attorney fees in excess of the amount of damages awarded. *Manual, supra*, §§21.61, 21.62. None of the aforementioned concepts are at play in the case here. The procedure agreed to by the parties takes into account the interests of all parties and contains built in process protections so that class members are protected.

> "Excluded Claims" shall mean (1) any Claim for personal injury arising out of the Incident or (2) any Claim made by any person or Business who or which Opts Out of the Class in compliance with orders of the Court.

As indicated above, the release encompasses all potential real property damage claims, including nuisance and trespass claims.[5] Although no such claims are alleged in the latest iteration of the class action complaint, they may be legitimately released in this class settlement. This concept has been recognized by numerous circuit courts of appeals and the U.S. Supreme Court.[6] Indeed, the U.S. Supreme Court in *Matsushita Elec. Indus. Co., Ltd. v. Epstein 516 U.S. 367, 376-377, 116 S.Ct. 873, 879 (1996)* stated:

> [I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.' *Matsushita Elec. Indus. Co., Ltd. v. Epstein 516 U.S. 367, 376-377, 116 S.Ct. 873, 879 (U.S.Cal.,1996)* (quoting *TBK Partners, Ltd. v. Western Union Corp.,* 675 F.2d 456, 460 (C.A.2 1982)).

The Fifth Circuit Court of Appeals addressed this question in *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221-222 (5th Cir., 1981), *cert. den. sub nom, CFS Continental, Inc. v. Adams Extract Company*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982), stating:

> The objectors first argue that because the district court did not have the state law claims before it, it was without power to release those claims by approving a settlement. This is simply a misstatement of applicable legal principles, at least in cases such as this one in which class members were notified that their state law claims might be released before they had to decide whether to opt out of the class. The weight of authority establishes that in such a case, a court may release not only those claims alleged in the complaint and before the court, but also claims which "could have been alleged by reason of or in connection with any matter or fact set forth or referred to in" the complaint. Patterson v. Stovall, 528 F.2d 108, 110 n.2 (7th Cir. 1976). See also McDonald v. Chicago

[5] The release is intended by the Parties to release all claims, excluding personal injury claims, and this limited discussion of property damage claims does not alter that intent.

[6] It does not appear that the Fourth Circuit has addressed this issue in any reported decision.

> Milwaukee Corp., 565 F.2d 416, 435 (7th Cir. 1977). And it has been held that even when the court does not have power to adjudicate a claim, it may still "approve release of that claim as a condition of settlement of (an) action (before it)." Abramson v. Pennwood Investment Corp., 392 F.2d 759, 762 (2d Cir. 1968) (shareholder derivative action).[FN40] Thus, the court had power to release the state claims even though those claims were not pending before it.

Decisions in the First, Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits are in accord with the holding of the Fifth Circuit. See *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1 Cir. 1991); *Wal-Mart Stores, Inc. v. VISA U.S.A., Inc. et al*, 396 F.3d 96, 107 (2d Cir. 2005); *In re: Prudential Insurance Company America Sales Practice Litigation Agent Actions*, 148 F.3d 283, (3d Cir. 1998); *Olden v. Gardner*[7], 294 Fed. Appx. 210 (6 Cir. 2008); *Tropp v. Western Southern Life Ins. Col,* 381 F.3d 591, 595-596 (7 Cir. 2004); *In re: Gen. Am. Life Ins. Co. Sales Practices Litigation,* 357 F.3d 800, 805 (8 Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9 Cir. 1992).

Newberg on Class Actions has weighed in on this issue as follows:

> A class of mortgagors was certified for settlement purposes in an action against a mortgagee. In Whitford v First Nationwide Bank, the court rejected an objector's contention that the district court erred in preliminarily approving a settlement that barred class members from pursuing other claims against the defendant. A settlement may properly prevent class members from subsequently asserting claims relying upon a legal theory different from that relied upon in the class action complaint, but depending upon the same set of facts. Here the scope of the releases contained in the settlement was fair, reasonable and adequate and was disclosed sufficiently in the Notice to the class.
>
> 4 *Newberg on Class Actions* §12:15 (4th Ed.)

B. All claims sought to be released arise out of the same set of operative facts.

The operative facts upon which this class action are based arise out of a singular event, the fire at the EQIS facility in Apex, N.C. and the alleged negligent acts of all defendants that

[7] This is the settlement of a case previously cited by plaintiffs in briefing: *Olden v. LaFarge*, 383 F.3d 495 (6 Cir.

caused the fire. The "Released Claims" as defined in the PSA, relate only to those claims "arising from the Incident."

The Second Circuit in *TBK Partners Ltd. v. Western Union Corporation*, 675 F.2d 456 (2d Cir. 1982)[8], said:

> Nonetheless, where there is a realistic identity of issues between the settled class action and the subsequent suit, and where the relationship between the suits is at the time of the class action foreseeably obvious to notified class members, the situation is analogous to the barring of claims that could have been asserted in the class action. Under such circumstances the paramount policy of encouraging settlements takes precedence.

That property damage claims may arise from the EQIS fire in the instant case is forseeably obvious. Any lawsuit for property damages would require the same elements of proof of the predominant issues in this class action.

In making this analysis, the Court need not inquire into the merits of such claims, but should only be concerned with the general likelihood of success or failure. *Matsushita, supra* (quoting from *TBK Partners*) 516 U.S. 367, at p. 382. As stated by the Second Circuit in *TBK Partners*:

> (A)pproval of a settlement does not call for findings of fact regarding the claims to be compromised. The court is concerned only with the likelihood of success or failure; the actual merits of the controversy are not to be determined. The evidence is limited accordingly. The rules of evidence are relaxed. The court listens to the advice and wishes of interested parties. This is not the procedural stuff from which binding determinations of fact can be drawn.
>
> *TBK Partners, supra.* 675 F.2d 456, at p. 461.

Even if the court were required to examine the merits of released claims, the findings would be unimpressive. The likelihood of property damages resulting from this Incident is

---

2004)

[8] *TBK Partners* was cited favorably by the U.S. Supreme Court in *Matsushita, supra.* 516 U.S. at p. 376-377.

virtually non-existent. After extensive testing of property in Apex by the North Carolina Department of Environment and Natural Resources (DENR), DENR issued a press release saying: "What we were looking for was any indication that homes or businesses might have been contaminated with heavy metals or other chemicals from the fire that could present a health risk to Apex citizens…We didn't find that."[9] (emphasis added)

C. The class representatives have standing to release property damage claims.[10]

The class representatives, and the class they represent, are all residents and businesses in the two evacuation zones. By definition, they have a possessory interest in real estate, by virtue of being a property owner, tenant, invitee, etc. As such, they all have potential property damage claims, including claims for nuisance and/or trespass. Therefore, whatever potential property damage claims the class representatives have, however tenuous, they have standing to release those claims.

The Court, in assessing adequacy of representation, must consider whether the class representatives are trying to obtain a better settlement by sacrificing the claims of others. First of all, as stated above, the class representatives are invested with the same potential property damage claims as those of the class, and they are giving up the same rights as the class as a whole. Secondly, the number and viability of any such claims are highly speculative.

Overarching these concerns, however, should be the Court's recognition of the ultimate protection for class members who desire to pursue property damage claims: notice and the opportunity to opt out. The proposed notices to the class clearly advise class members that

[9] In support of this conclusion, Defendants also filed the NCDENR press release containing this quote, DE # 192-8, and a news report to the same effect, DE # 192-7.
[10] See fn 5, above.

nuisance, trespass and all property damage claims are being released in this settlement, and that a class member must opt out of the class in order to bring such a claim on his own. If any class member wishes to pursue a nuisance, trespass or property damage claim, he may opt out of the class and file his own lawsuit for all of his damages resulting from the Incident.

VI. THE COURT SHOULD APPROVE THE PROPOSED NOTICE TO THE PUTATIVE CLASS

A. Legal Standard

The Notice and the proposed notice plan contained in the PSA satisfy Rule 23(c)(2)(B), Rule 23(e), and due process. Under Rule 23(e), the "court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." Fed. R. Civ. P. 23(e)(1). The Notice must also comply with Rule 23(c)(2)(B).

B. Form and Content of Notice

The content of the notice must comply with Rule 23(c)(2)(B). This rule provides that the notice must concisely, and clearly state in plain easily understood language:(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (vi) the binding effect of a class judgment on the class members under Rule 23(c)(3).

Here, the notice complies with Rule 23(c), and goes beyond what is required to meet due process . The notice accurately summarizes the settlement terms and advises the putative Class of the benefits, rights and limitations of the proposed settlement. See *Grice v. PNC Mortgage Corp. of America*, No. CIV. A. PJM-97-3084, 1998 WL 350581, at *7 (D. Md. May 21, 1998).

While the notice condenses the terms of the proposed settlement, it covers all relevant topics: the history of the litigation, the substantive terms of the proposed settlement, the Class definitions, the effect of the proposed settlement and release of claims, conditions of the proposed settlement, what putative Class Members must do to exclude themselves from the class, what they must do if they wish to object to the Class certification, and what they must do if they wish to file a claim under the proposed settlement. The notice, furthermore, is written and formatted to communicate this information in a manner that will be understood by members of the Class, who presumably, are not lawyers. See id. (The notice should "employ plain language"); see also *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F. Supp. 450, 495-96 (D.N.J. 1997), aff'd, 148 F.3d 283 (3rd Cir. 1998) Manual supra, §§21.312. Finally, the notice and the notice plan are endorsed by the Settlement Administrator, James L. Griggs, who routinely handles such matters as part of his duties as a regularly-appointed notice agent, settlement master, or settlement administrator. *See attached Exhibit 3.*

C. Notice Dissemination Plan

The proposed notice plan is described in Section 6 of the PSA. The proposed notice plan involves four fronts. First, the notice will be distributed by direct mail to all residences within the geographical boundaries of the Recommended and Secondary Evacuation Zones, and to all businesses within and geographically contiguous to the Recommended Evacuation Zone. Second, it provides for publication of the notice in a local newspaper of widespread distribution, namely Raleigh's The News & Observer. Third, courtesy copies of the notice will be mailed to any attorneys, other than Class Counsel, known to represent members of the putative class. The notice also provides for toll free number with an automated information system which will be made available during the claims processing period. Fourth, the notice plan provides for the development and management of a website by the Settlement Administrator to provide information and permit the review and downloading of the notice, Proof of Claim Forms, and other forms. By any measure, this notice plan meets and exceeds all the requirements of due process and Rule 23. (*See also Affidavit of James L. Griggs, Exhibit 3*.)

D. Notice to Government Authorities

Pursuant to 28 U.S.C. §1715, Defense Counsel for each of the Defendants shall serve all required notices within 10 days of the filing of the Joint Motion.

VII. APPROVAL OF OTHER RELATED MATTERS

The Parties also request the Court to approve other related matters as indicated below. In order for the proposed settlement to be properly implemented, these matters need to be approved pending final approval and certification of the Class.

A. Appointment of the Settlement Administrator

The Parties have agreed that James L. Griggs of Litigation Settlement Services should serve as the Settlement Administrator and will have those responsibilities set forth in the PSA including acting as the notice agent. The Parties, therefore, request that the Court approve and appoint James L. Griggs of Litigation Settlement Services to serve as the Settlement Administrator with authority to disseminate notice in accordance with the PSA, and to perform all other duties described in the PSA, including the processing and resolution of Proof of Claim Forms, opt outs, development of claim response reports and payment of Approved Claims, and other fees and expenses as provided in the PSA. (*See Affidavit of James L. Griggs attached hereto as Exhibit 3.)*

B. Appointment of Guardian ad Litem

The Parties request the Court to appoint North Carolina attorney Daniel T. Barker as Guardian ad Litem, who will represent the members of the putative Class who are minors or who lack capacity. The Guardian ad Litem will have those responsibilities set forth in the PSA, and serve to protect the interests of all potentially affected minors. (*See CV of Mr. Barker attached hereto as Exhibit 2.)*

C. Appointment of Class Representatives and Class Counsel

Plaintiffs, Suellen E. Beaulieu, Michael Borden, Betsy Borden, Lisa Carley, Clifford Randy Wilder, Tara Wilder, Josephine Cross, Anne M. Acosta, George Acosta, and Denise Hatzidakis, individually and on behalf of Hatzidakis, LLC d/b/a Xios Restaurant seek to be appointed representatives for the proposed Settlement Classes. They have participated actively in this Litigation, responding to written discovery, giving their depositions and participating in the mediation of this settlement. Each of these class representatives have taken substantial litigation risks on behalf of the class and should be appointed pursuant to Rule 23. The affidavits of these class representatives are attached hereto as *Exhibits 11-18.*

As stated above, and as indicated in the Affidavits attached as E*xhibits 4-9,* Henry T. Dart, Donald J. Dunn, M. David Karnas, J. Michael Malone, Roger W. Orlando, Jesse S. Shapiro, and Robert E. Zaytoun, should be determined to be adequate Class Counsel for the proposed Settlement Classes and the Court should appoint these attorneys to serve in this capacity pursuant to Rule 23(g).

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court : (i) certify the three subclasses for the purposes of settlement pursuant to Rules 23(a), 23(b)(3) , 23(c)(5), and 23(e); (ii) grant preliminary approval of the proposed settlement and the PSA; (iii) approve the form and content of the Notice and direct that the Notice be distributed to the class in the manner prescribed in the PSA; (iv) schedule a final fairness hearing to consider granting final approval of the proposed settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure; (v) approve the appointment of Daniel Barker, Esq., as Guardian ad Litem, and direct said Guardian ad Litem to carry out the responsibilities of the Guardian ad Litem as set forth in the PSA; (vi) approve the appointment of James L. Griggs of Litigation Settlement Services as Settlement Administrator to disseminate notice as set forth in the PSA, to receive and process Proof of Claim Forms and opt outs pursuant to the terms of the PSA and the Proof of Claims Processing Protocol, and to carry out all other functions of the Settlement Administrator as set forth in the PSA; and (vii) approve the appointment of the Class Representatives and Class Counsel, as set forth above.

The parties have requested, in their Joint Motion, a telephonic status conference to set the Final Fairness Hearing date. Attached hereto as *Exhibit 19* is a proposed timeline to assist the Court in that endeavor.

Respectfully Submitted,

Plaintiffs' Management Committee

By:__/s/ Robert E. Zaytoun____________

ROBERT E. ZAYTOUN, Liaison Counsel
NC Bar # 6042
ZAYTOUN LAW FIRM, PLLC
510 Glenwood Avenue, Suite 301
Raleigh, NC 27603
Telephone: (919) 832-6690
Facsimile: (919) 831-4793

HENRY T. DART
HENRY DART, ATTORNEYS AT LAW, P.C.

LA. Bar # 4557
510 N. Jefferson Street
Covington, Louisiana 70433
Telephone: (985) 809-8093
Facsimile: (985) 809-8094

M. DAVID KARNAS, ESQ.
BELLOVIN & KARNAS, P.C.
AZ Bar # 013728
131 E. Broadway
Tucson, Arizona 85701
Telephone: (520) 571-9700 ext. 210
Facsimile: (520) 571-8556

J. MICHAEL MALONE, PH.D., ESQ.
Hendren & Malone, PLLC
NC Bar # 26512
4600 Marriott Drive
Suite 150
Raleigh, NC 27612
Telephone: 919-573-1423
Facsimile: 919-420-0475

ROGER W. ORLANDO, ESQ.
The ORLANDO Firm, P.C.
GA Bar # 554295
315 West Ponce De Leon Ave. Ste. 400
Decatur, GA 30030
Telephone: (404) 373-1800
Facsimile: (404) 373-6999

DONALD J. DUNN, ESQ.
NC Bar # 8737
2500 Trent Road, Suite 36
PO Drawer 1574
New Bern NC 28563
Telephone: 252-637-5800
Facsimile: 252-638-5976

JESSE SAYRE SHAPIRO, ESQ.
Law Office of Jesse Shapiro
NC Bar # 27326
800 W. Williams Street
Suite 231-Q
Apex, NC 27502
Telephone: (919) 303-1116
Facsimile: (919) 303-3788

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR CERTIFICATION OF SETTLEMENT CLASSES AND RELATED MATTERS** on the Court's electronic docketing system. By previous Case Management Order, Liaison Counsel are authorized and designated to receive filing electronically from the Court on behalf of all defendants. Therefore, the undersigned upon information and belief certifies that all counsel of record as noted below, will receive a copy of these papers through the Court's electronic notice system:

This, the 23rd day of March, 2009.

ADDRESSED TO:

Liaison Counsel for Defendants,
Counsel for EQIS and EQ Holding
Frederick W. Rom, Esq.

Counsel for Defendant ST Mobile
Aerospace Engineering, Inc.
Richard T. Boyette

Womble Carlye Sandridge & Rice, PLLC
150 Fayetteville St. Suite 2100
Raleigh, NC 27601
(919) 484-2300
(919)484-2073 (fax)
from@wcsr.com

Cranfill Sumner & Hartzog, LLP
P. O. Box 27808
Raleigh, NC 27611-7808
919-863-8729
919-863-3519 (fax)
rtb@cshlaw.com

Counsel for Defendant Allworth, LLC, f/k/a Allworth, Inc.
Steven B. Epstein
Hunton & Williams
P.O. Box 109
Raleigh, NC 27602
919-899-3071
919-833-6352(fax)
sepstein@hunton.com

ZAYTOUN LAWFIRM, PLLC

/s/Robert E. Zaytoun
Robert E. Zaytoun
Lliaison Counsel for Plaintiffs